UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SEVEN

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INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO

Respondent,

and CASE 7-CB-186559

MGM GRAND DETROIT, LLC

Charging Party.
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POST-HEARING BRIEF OF RESPONDENT INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

Shira Roza
Edward Macey
International Union, UAW
8000 E. Jefferson Ave.
Detroit, MI 48214
(313) 926-5216
(313) 926-5240 (fax)
sroza@uaw.net
emacey@uaw.net

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Introduction

Respondent International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW ("UAW" or "Union") submits this Post-Hearing Brief in support of its request for dismissal of the complaint issued by Region 7 of the National Labor Relations Board in the above-captioned case ("Complaint").

This is a straightforward case. The General Counsel has alleged that the Union violated Section 8(b)(3) of the National Labor Relations Act ("Act") when it "unreasonably delayed" in providing MGM Grand Detroit, LCC ("Employer" or "MGM Grand") with information allegedly requested on August 2, 2016. However, as illustrated below, no such request was made. Therefore, there is no basis for the General Counsel's contention that the Union violated the Act.

Moreover, even if the General Counsel had proven the existence of an August 2nd request, it failed to establish that the allegedly-requested information was relevant or necessary to the Employer's bargaining responsibilities. The Employer could – and did – fully process the related grievance before receiving the allegedly-requested information, and the information had no bearing on mitigation. Finally, the General Counsel introduced no evidence whatsoever that the Union's "delay" in providing the allegedly-requested information was unreasonable. Indeed, the Union provided the information well before the Employer's stated deadline for desiring it.

For these reasons, and those outlined below, the General Counsel has failed to meet its burden of proving that the Union violated Section 8(b)(3) of the Act. Therefore, the Union respectfully requests that the Complaint be dismissed.

Facts

The Union, together with UAW Local 7777 ("Local"), represents a unit of dealers, marketing representatives, VIP specialists, cashiers, count room employees, and slot techs at MGM Grand. Tr. 83-84.[1]

On June 2, 2014, the Employer terminated bargaining unit member Victor Swanson ("Grievant") for failing to return to work after a medical leave of absence. Implicated in the termination was Article 14 ("Leaves of Absence") of the parties' collective bargaining agreement ("CBA"). Tr. 85. Article 14.01(a)(2) provides: "A medical leave of absence will not exceed the lesser of time worked or one year. An Employee who exceeds the one year medical leave of absence shall be placed on inactive status." J. Exs. 1, 2. Article 14.09(a) provides that, before returning from a medical leave of absence, an employee must provide "a written release from a

[1] Citations to the transcript are referred to as "Tr." and the page number. Exhibits are referred to herein as follows: Joint Exhibits as "J. Ex. __," General Counsel Exhibits as "GC Ex. __," and Union Exhibits as U. Ex. __."

licensed physician stating that the Employee is able to return to work," i.e., a doctor's note. J. Exs. 1, 2.

On June 19, 2014, the Local grieved the termination ("Grievance") and demanded the Grievant's reinstatement. GC Ex. 2. The Grievance was initially processed by the Local, and then by UAW International Representative Rashon Byrd. Tr. 84-85. In or around January 2016, UAW International Representative Keith Neargardner ("International Representative") assumed responsibility for its processing. Tr. 84.

In an effort to resolve the Grievance, the International Representative had a total of three conversations with Employer human resources representative Tara McIntosh ("HR Representative"). Tr. 30, 33, 35. The first of these conversations occurred on August 2, 2016, during which the parties discussed the Union's concerns with the Employer's then current settlement offer. Tr. 30-33. At the time, the Employer had offered to settle the Grievance by placing the Grievant on inactive status, but it had not yet offered reinstatement. Tr. 31.

Although reinstatement was not yet on the table during the August 2nd conversation,[2] the HR Representative conveyed to the International Representative Article 14.09(a)'s requirement, i.e., that to be reinstated the Grievant must provide a doctor's note showing that he could, in fact, return to work. Tr. 32-33. Per the HR Representative's testimony:

> I was . . . letting them know that we could entertain talking about a return to work if we had return to work documentation, if we had a medical documentation that could show that [the Grievant is] medically able to return to work.

Tr. 32. She continued,

> I said, well, in order to return [the Grievant] at all, we would need to be able to see that he actually could return for work because he was coming off a medical leave when he got terminated.

[2] All dates are 2016 unless otherwise noted.

Tr. 33.

On August 4th, although reinstatement was still not on the table, the HR Representative reiterated the contractual requirement that a doctor's note would be a condition of reinstatement:

> And I was calling [the International Representative] to let him know, okay, . . . in order for [the Grievant] to return to work, physically return to work when he was able to do that, then you provide the return to work documentation – medical documentation that shows he was able to do that and then we will return him to work.

Tr. 34. At that point, however, because the Employer's offer still did not include reinstatement, Tr. 89-90, and because the Employer had not actually requested a doctor's note, Tr. 30-34, there was no legal or contractual reason for the Grievant to provide the Employer with such a note. Moreover, at the time of these conversations, the Grievant had not yet secured a doctor's note, and the International Representative saw no reason to direct the Grievant to obtain one, as reinstatement had not yet been offered. Tr. 89-90.

The HR Representative and International Representative spoke a third and final time on September 28th. Tr. 35. However, nothing of substance was discussed. Id.

The International Representative subsequently sought Grievance-related assistance from the Union's legal department, and Associate General Counsel William Karges ("Union Attorney") was assigned to the case. Tr. 90-91

On September 22nd, the Union Attorney, the International Representative, and Employer attorney Gary Klotz ("Employer Attorney") discussed the Grievance by phone. Tr. 95. During that call, the Employer Attorney conveyed a settlement offer that, for the first time, included reinstatement. Tr. 95-96, 98.

With reinstatement on the table, the Union now had a contractual reason to direct the Grievant to obtain a doctor's note so that he could prove his ability to work and satisfy the

requirements of Article 14.09(a). Therefore, immediately after the September 22nd call, the International Representative and the Union Attorney called the Grievant and directed him to secure a doctor's note. Tr. 96-97. Five days later, on September 27th, the Union sent the Grievant a letter reminding him to secure such a note. J. Ex. 3. When the Grievant had difficulty securing such a note, the Union helped him contact his doctors by drafting and faxing them letters. Tr. 99-100; U. Ex. 1. On or around October 6th, the Grievant secured a note from one of his doctors stating that he was physically able to return to work ("Doctor's Note"), GC Ex. 13, and provided the note to the Union. Tr. 101-102. Shortly thereafter, on October 14th, the Union provided the Doctor's Note, along with other Grievance-related information, to the Employer Attorney.[3] GC Ex. 11. One week later, on October 21st, the Union provided the Employer Attorney with additional Grievance-related information. U. Ex. 2. These facts eliminate any doubt that, as soon as the Employer offered reinstatement, the Union acted diligently to ensure that the Grievant could comply with Article 14.09(a) by providing the Doctor's Note to the Employer.

Meanwhile, the Grievance had been scheduled for an arbitration hearing ("Arbitration") on October 7th. GC Ex. 7. With the Arbitration looming, the Employer agreed to consider potential cash settlements, and the Employer Attorney claimed he needed to gather certain information to calculate such settlements. GC Ex. 4, 6. In repeated emails to the Union and arbitrator, he referenced a September 22nd request for information that he himself, rather than the HR Representative, had purportedly made. On Monday, October 3rd, the Employer Attorney wrote:

> I requested Mr. Swanson's medical documentation . . . I also requested documentation of Mr. Swanson's mitigation efforts . . . MGM Grand Detroit cannot negotiate a settlement regarding Mr. Swanson without the requested information. Please send me the

[3] The Union Attorney did not immediately provide the Employer Attorney with the Doctor's Note because he was in the process of gathering additional documents to send to the Employer Attorney. Tr. 103-104. Notably, the Employer Attorney had given the Union Attorney a deadline of October 21st to provide the Grievance-related documentation, GC Ex. 10, and the Doctor's Note was provided to the Employer Attorney well before that deadline. GC Ex. 11.

> requested information as soon as possible, so that neither postponing the arbitration hearing nor filing an NLRB charge will be necessary.

GC Ex. 6. And on October 4th he wrote:

> I have made an information request that is essential to further settlement discussions, but the union has not produced the requested documents.

GC Ex. 7. Notably, until October 11th, the Employer Attorney neglected to claim that such a request had previously come from the HR Representative. GC Ex. 10.

On the morning of Monday, October 3rd, the Employer Attorney e-mailed the International Representative, stating: "If [the Grievant] does not make a settlement proposal and if MGM Grand Detroit does not promptly receive the requested information, an arbitration hearing on Friday will be unavoidable." GC Ex. 6. When the Union did not provide the Employer Attorney with additional information by the following afternoon, the Employer Attorney e-mailed the arbitrator, stating:

> I have made an information request that is essential to further settlement discussions, but the union has not produced the requested documents. Without these documents, I may need to file an NLRB charge and to request a postponement of the hearing that is currently scheduled for Friday, October 7th.

GC Ex. 7. The Union Attorney responded: "If you think you have a charge over info you very recently requested – file it." GC Ex. 8. Shortly thereafter, the Employer Attorney requested an adjournment, agreeing to pay all fees associated with the postponement. GC Ex. 8.

On October 11th, the Employer Attorney asked the Union to provide the Grievance-related information by October 21st. GC Ex. 10. Nevertheless, on October 19th, three days before his stated deadline, and despite the fact that the Union had already provided the Employer with several pieces of information, including the Doctor's Note, the Employer Attorney filed an unfair labor practice charge ("Charge") with Region 7 of the National Labor Relations Board, alleging that the

Union had "failed and refused to produce, in response to repeated information requests, relevant information in violation of its duty to provide information." GC Ex. 1(a).

In sum:

- On September 22nd, the Employer Attorney conveyed a settlement offer that, for the first time, included reinstatement. Tr. 95-96, 98. Immediately thereafter, the International Representative and the Union Attorney called the Grievant and directed him to secure a doctor's note. Tr. 96-97.
- On September 27th, the Union sent the Grievant a letter reminding him to secure a doctor's note. J. Ex. 3
- On October 6th, the Grievant secured the Doctor's Note and provided it to the Union. GC Ex. 13; Tr. 101-102.
- On October 11th, the Employer Attorney provided the Union with a deadline of October 21st to provide the "requested information." GC Ex. 10.
- On October 14th, The Union provided the Doctor's Note, along with other Grievance-related information, to the Employer Attorney. GC Ex. 11.
- On October 19th, the Employer Attorney filed the Charge. GC Ex. 1(a).
- On October 21st, The Union provided the Employer Attorney with additional Grievance-related information. U. Ex. 2.

Indeed, the record shows that the Charge could not have been brought as part of any true effort to receive meaningful information, as the Union had provided such information well before the Charge was filed.

On January 19, 2017, the Region issued a Complaint and Notice of Hearing ("Complaint"). GC Ex. 1(c). Notably, rather than alleging, as the Charge had, that the Union had "failed" to produce information in response to "repeated" requests, the Complaint alleged simply that the Union had "unreasonably delayed" in providing information in response to the alleged August 2nd request. GC Ex. 1(c). On May 8, 2017, a hearing was held before Administrative Law Judge Michael Rosas ("Judge").

Argument

The General Counsel has the burden of proving that the Union violated Section 8(b)(3) of the Act. See, e.g., United Ass'n of Journeymen (Gibbs & Hill, Inc.), 204 NLRB 779, 780 (1973). To do so, the General Counsel must prove (1) that the Charging Party made a request for information, (2) that the requested information was relevant to and necessary for collective bargaining, and (3) that the Union unreasonably delayed in providing the requested information. See, e.g., Postal Serv., 365 NLRB No. 51 (Mar. 24, 2017); Mason Tenders Local Union #388 (Sprinkle Masonry, Inc.), 352 NLRB No. 2 (Jan. 23, 2008). As explained more fully below, the General Counsel has failed to meet its burden. Therefore, the Complaint must be dismissed.

I. THERE WAS NO AUGUST 2ND REQUEST FOR INFORMATION.

The Complaint alleges that, on or around August 2nd, the Employer "orally requested" that the Union "provide it with all medical documentation" relating to the Grievant. GC Ex. 1(c). The record, however, is completely devoid of any evidence that the Employer requested anything on August 2nd, let alone "all medical documentation" relating to the Grievant. Therefore, the Complaint must be dismissed.

As a preliminary matter, the Complaint does not allege that the Union refused to provide information. Rather, it alleges that the Union "unreasonably delayed" in furnishing the Employer with the allegedly-requested information, i.e., "all medical documentation" relating to the Grievant. GC Ex. 1(c). The only Grievant-related medical information that the Union in fact provided to the Employer was the Doctor's Note. Therefore, the "all medical documentation" referred to in the Complaint could only be the Doctor's Note. Indeed, Counsel for the General Counsel never suggested otherwise.

Per the Complaint, the alleged request was made on August 2nd. The record indicates that the only Employer representative who had a discussion with a Union representative on or around August 2nd was the HR Representative. The HR Representative's undisputed testimony indicates that, although a doctor's note was discussed as part of the contractual reinstatement process, no request was ever made.

The record indicates that the HR Representative discussed the Grievance with the International Representative on three occasions: August 2nd, August 4th, and September 28th. On August 2nd, despite not yet having offered reinstatement, the HR Representative explained that the Grievant could not be reinstated unless he provided a doctor's note. Tr. 32-33 ("I said, well, in order to return [the Grievant] at all, we would need to be able to see that he actually could return for work . . . ."). On August 4th, the HR Representative reiterated this contractual condition of reinstatement. Tr. 34 ("I was calling [the International Representative] to let him know . . . in order for [the Grievant] to return to work, physically return to work when he was able to do that, then you provide the return to work documentation . . . ."). Although the parties spoke for a third and final time on September 28th, they did not discuss the Grievant's medical documentation. Tr. 35-36.

The HR Representative's testimony, which is undisputed and corroborated by her contemporaneous notes, Tr. 43-44, demonstrates that she never requested anything from the International Representative or from any other Union representative.[4] Rather, as part of her settlement discussions with the International Representative, she conveyed a condition of

[4] The HR Representative's testimony suggests that she had previously discussed the Grievance with International Representative Rashon Byrd. Tr. 31. However, the HR Representative did not testify to the content of these conversations.

reinstatement, i.e., that the Grievant would be required to produce a return-to-work note before reinstatement, a condition that had been codified in Article 14 of the parties' CBA. J. Exs. 1, 2.

A contractual provision requiring a grievant to provide a doctor's note as a condition of reinstatement is similar to one requiring a grievant to submit to and pass a drug test or a physical examination before reinstatement. The purpose of the condition is to prove to the employer before reinstatement that the grievant is physically able to perform his or her job. If the grievant does not submit to a drug test or undergo a physical examination, the consequence, generally, is that the grievant is not reinstated. A grievant's failure to submit to a drug test or undergo a physical examination is not a violation of the Act, either by the grievant or his or her union. Similarly, if a grievant does not provide a contractually-required doctor's note, the consequence, generally, is that he or she is not reinstated, not a finding that the grievant or his or her union has violated the Act.

Although the record does not show that the HR Representative herself requested any information, either on August 2nd or on any other date, several e-mails from the Employer Attorney to the International Representative reference a request that he himself had allegedly made on September 22nd. GC Exs. 6, 7.

To the extent that the Judge finds that the Employer Attorney did make such a request on September 22nd, and that the requested information was relevant and necessary to the Employer's bargaining responsibilities, which the Union does not concede, see Section III, infra, the Union took steps to provide the Employer with a doctor's note immediately following the September 22nd call. First, the Union called the Grievant and directed him to secure a doctor's note. Tr. 96-97. Next, the Union followed up with a letter. J. Ex. 3. Finally, the Union helped the Grievant contact his doctors when the Grievant alone was unable to secure the contractually-required note. Tr. 99-

100; U. Ex. 1. Ultimately, the Union provided the Employer with the Doctor's Note a mere three weeks after the September 22nd call. GC Ex. 11.

The General Counsel's entire case stands on one August 2nd information request. No such request was made. Therefore, the Complaint must be dismissed.

II. IN THE ABSENCE OF A REQUEST, THE UNION HAD NO DUTY TO PROVIDE INFORMATION.

Both employers and unions have a duty to furnish each other with information that is relevant and reasonably necessary to the others' bargaining responsibilities. See Bridge, Structural and Ass'n of Eastern Ohio and Western Pa., 319 NLRB 87, 90 (1995); N. Am. Soccer League, 245 NLRB 1301, 1305–06 (1979). However, this duty to provide information does not arise until a party actually requests the information. Boston Herald-Traveler Corp., 102 NLRB 627, 628 (1953). As described in Section I, supra, both the HR Representative and the Employer Attorney conveyed to the Union the contractual requirement that the Grievant must produce a doctor's note before reinstatement. However, they did not outright request such information. Consequently their statements did not trigger a duty of disclosure. See, e.g., A.W. Schlesinger Geriatric Ctr., 304 NLRB 296, 297 (1991) (finding no obligation to supply information where the union asked questions and made statements concerning how certain employees would be treated but did not make clear and definite requests for information). Therefore, the Complaint must be dismissed.

[Continued on following page]

III. THE DOCTOR'S NOTE WAS NOT RELEVANT OR NECESSARY TO THE EMPLOYER'S BARGAINING RESPONSIBILITIES.

The Employer could – and did – fully process the Grievance without the Doctor's Note. Therefore, the Doctor's Note was not relevant or necessary to the Employer's bargaining responsibilities, and the Union had no duty to provide it.

Parties must provide each other with information that is relevant and necessary to their bargaining responsibilities. See Bridge, Structural and Ass'n of Eastern Ohio and Western Pa., 319 NLRB at 90; N. Am. Soccer League, 245 NLRB at 1305–06. With regard to grievances, the duty to provide information is designed to allow the parties to make considered judgments about the strengths of their claims, to eliminate non-meritorious claims at an early stage, and to prepare for arbitration. See, e.g., Chem. Solvents, Inc., 362 NLRB No. 164 (Aug. 24, 2015) (employer violated 8(a)(1) and (5) by failing to provide the union with information necessary for the union to determine whether to pursue its grievance); P.R. Mallory & Co., Inc., 171 NLRB 457, 458 (1968) (employer violated the Act where it failed to provide information that was necessary to enable the union to intelligently evaluate grievances filed and to determine whether such grievances were meritorious and whether to press for arbitration). See also NLRB v. Acme Indus. Co., 385 U.S. 432, 439 (1967) (it is a violation of 8(a)(5) for an employer to fail to provide a union with information necessary to enable the union to intelligently evaluate and process grievances).

To process the Grievance, the Employer was required to determine whether the Grievant had been properly terminated and to act accordingly. Whether the Grievant could, in fact, have returned to work if reinstated, which is the only fact that a doctor's note would have proven, had no bearing on whether the termination was proper.

The HR Representative testified, inter alia, that the Employer needed the Doctor's Note to help settle the case before arbitration. Tr. at 37-38. The record, however, demonstrates that the

Doctor's Note was not necessary for settlement purposes, as the Employer offered to reinstate the Grievant on September 22nd, several weeks before receiving Doctor's Note.

In its opening statement, Counsel for the General Counsel argued that the Employer needed the Doctor's Note "to assess Respondent's back pay request for [the Grievant]." Tr. 13. However, because the Employer already knew the liability period, and because the Doctor's Note was in no way related to mitigation, this argument fails. First, it is well-established that an employer's back pay liability terminates upon an agreement to reinstate and the provision of a return-to-work date. Therefore, the Doctor's Note was not necessary for the Employer to ascertain the liability period, as such period would simply be the date of the Grievant's termination until the agreed-upon return-to-work date. Moreover, to the extent that the Employer was concerned with assessing the Grievant's mitigation efforts, the Doctor's Note would not have helped. In accordance with the contractual procedure, the Doctor's Note stated that the Grievant could return to work as of the Employer's offer of reinstatement; it did not provide that he could have returned to work at some earlier point during the liability period. Finally, regarding mitigation, the Union provided the Employer with all relevant documents that it possessed. U. Ex. 2.

The record does not indicate that the Charge was filed because the Doctor's Note was relevant or necessary to the Employer's bargaining responsibilities. Rather, the Employer Attorney filed the Charge because he was frustrated in his attempts to gather information to help him prepare for arbitration. GC Exs. 6, 7. It is true that the Union did not provide the Employer Attorney with everything he wanted to prepare for arbitration in the manner that he desired. While this may have been frustrating to the Employer Attorney, it did not violate the Act. See, e.g., Cal. Nurses Ass'n (Alta Bates Med. Ctr.), 326 NLRB 1362, 1362 (1998) ("[I]t is well settled that there is no general right to pretrial discovery in arbitration proceedings.").

IV. THE ALLEGED DELAY IN PROVIDING THE DOCTOR'S NOTE WAS NOT UNREASONABLE.

As previously discussed, the General Counsel failed to prove that the Employer made an August 2nd request for information. However, to the extent that the Judge finds that there was an August 2nd request for information, the Union's six week "delay" in providing that information was not unreasonable.

First, the Employer provided the Union with a deadline by which it desired the Doctor's Note: October 21st. GC Ex. 10. The Union provided the Doctor's Note on October 14th, a full week before the Employer's stated deadline. GC Ex. 11. It defies reason that providing a document to an employer a week before the employer's stated deadline for providing that document could constitute an "unreasonable delay" in violation of the Act.

Moreover, in assessing a claim of unreasonable delay, the Board considers the totality of the circumstances. Postal Serv., 354 NLRB 412, 412 (2009). Until September 22nd, when the Employer offered to reinstate the Grievant, Article 14.09(a) had not been implicated, and the Grievant had no reason to obtain or provide a doctor's note indicating that he could, in fact, return to work.

Finally, the Employer was in no way prejudiced by the Union's provision of the contractually-required Doctor's Note six weeks after the alleged August 2nd request. As explained above, the Doctor's Note was in no way relevant to the Employer's processing of the Grievance; the Employer could – and did – offer to reinstate the Grievant well before receiving the Doctor's Note. Rather, to the extent that anyone would have been prejudiced by any alleged delay, it would have been the Grievant himself, as the only consequence of not providing the Doctor's Note was that the Grievant could not be returned to the casino floor. Therefore, the Complaint must be dismissed.

Conclusion

For all the above-mentioned reasons, the Union respectfully requests that the Complaint be dismissed.

Respectfully Submitted,

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

By: _____

Shira Roza
Edward Macey
8000 E. Jefferson Ave.
Detroit, MI 48214
(313) 926-5216
(313) 926-5240
Attorneys for International Union, UAW

Dated: July 18, 2017

CERTIFICATE OF SERVICE

I, Shira Roza, hereby certify that I caused a true and correct copy of the foregoing Post-Hearing Brief of Respondent International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW to be served via email on the following parties on the date below:

Eric Cockrell
National Labor Relations Board, Region 7
477 Michigan Avenue, Room 300
Detroit, MI 48226-2569
eric.cockrell@nlrb.gov

Gary Klotz
Butzel Long
150 W. Jefferson Ave.
Detroit, MI 48226
klotz@butzel.com

Dated this 18th day of July, 2017

Shira Roza